Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT E. BURKE
(Counsel of Record)
DONALD J. UNGER
LAWRENCE M. FRIEDMAN
BARNES, RICHARDSON & COLBURN
200 East Randolph Drive
Suite 7920
Chicago, Illinois 60601
(312) 565-2000

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

75pp

QUESTION PRESENTED FOR REVIEW

Is a United States importer of motor vehicles entitled to a customs duty exemption for United States-origin body components (such as hoods, trunk lids, doors, roofs, etc.) that are assembled in Mexico into finished vehicles and are painted during the assembly process under tariff subheading 9802.00.80 which permits an exemption for such components when used in "assembly . . . and . . . [subjected to] operations incidental to the assembly process . . . such as . . . painting"?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the United States Court of International Trade and the United States Court of Appeals for the Federal Circuit were: Chrysler Corporation and the United States. Chrysler Corporation has no parent company; its nonwholly owned subsidiaries are listed below:

Chrysler de Mexico, S.A.
Eurostar Gesellschaft m.b.H.
Chrysler Europe S.A.
Chrysler Sales and Services (Thailand)
New Venture Gear, Inc.
Dollar Rent A Car Systems, Ltd. (New Zealand)
Thrifty Europe, S.A.
TRAC Asia Pacific, Inc.
Chrysler Commercial S.A. de C.V.

Chrysler is also majority owner, directly or indirectly, of 37 retail outlets in the United States and 17 retail outlets outside the United States

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PETITION FOR A WRIT OF CERTIORARI

Chrysler Corporation hereby petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Federal Circuit of March 22, 1996 is unpublished. It is available on Lexis at 1996 U.S. App. Lexis 6368 and is printed in the Appendix (hereinafter "App."), *infra*, 1. The opinion and judgment of the United States Court of International Trade is to be reported at 20 CIT ___ (1996). The trial court opinion has not been published in the *Federal Supplement* but is available at 1996 Ct. Intl. Trade Lexis 66 and is printed in the Appendix, *infra*, at 6.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Federal Circuit is dated and was entered on March 22, 1996.

STATUTORY PROVISIONS INVOLVED

Statutes

19 U.S.C. § 1202, *Harmonized Tariff Schedule of the United States* subheading 9802.00.80 (U.S. Int'l Trade Comm. Pub. No. 2937) provides in relevant part:

> Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States, which . . . have not been advanced in value or improved in condition except by operations incidental to the assembly process such as cleaning, lubricating and painting . . .[are subject to a] duty upon the full value of the imported article, less the cost or value of such products of the United States . . . .

Regulations

19 C.F.R. § 10.16(b) provides in relevant part:

> Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:
>
> . . .
>
> (3) Application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation. . . .

STATEMENT OF THE CASE

The question before the Court is whether tariff subheading 9802.00.80 ("9802") of the *Harmonized Tariff Schedule of the United States* ("HTSUS") and 19 C.F.R. § 10.16(b) require the United States Customs Service ("Customs") to grant a partial customs duty exemption for painted United States-origin components used in the foreign assembly of imported merchandise. This a question of first impression in this Court and is an important question of federal law that has not been but should be settled by this Court.

Chrysler Corporation is a United States manufacturer of motor vehicles and motor vehicle components. Chrysler's subsidiary in Mexico assembles passenger cars and trucks using many United States-origin components. The vehicles are then sold in the Mexican, Central American and United States markets. Subheading 9802 prevents Customs from imposing a duty on the value of United States-origin components used in the foreign assembly of imported goods when nonassembly operations performed on the components are "incidental" to assembly "such as . . . painting."

Customs has always granted a duty allowance under 9802 for most of the United States-origin components Chrysler de Mexico assembles into vehicles exported to the United States. Customs, however, determined that fully fabricated United States-origin exterior body components subjected to finish-coat painting during the assembly process are not entitled to the statutory exemption. According to Customs, the painting operations do not fall within the meaning of the statutory language permitting operations "incidental to the assembly process such as cleaning, lubricating and painting." According to

the Federal Circuit, under this statute, painting must undergo an economic analysis by Customs to ascertain whether the painting is "minor."

Chrysler filed an action in the Court of International Trade challenging Customs' refusal to grant the partial duty exemption. Based upon the Federal Circuit's decision in *General Motors Corp. v. United States*, 976 F.2d 716 (Fed. Cir. 1992) (App. 16), the Court of International Trade sustained Customs' determination. *Chrysler Corporation v. United States*, 20 CIT ___, slip op. 95-39 (Ct. Int'l Trade Mar. 13, 1995) (App. 7). Chrysler filed a notice of appeal on May 9, 1995 and the Federal Circuit docketed the appeal on June 6, 1995. Jurisdiction for the appeal was based upon 28 U.S.C. § 1295(a)(5). The Federal Circuit sustained the judgment of the Court of International Trade on March 22, 1996. *Chrysler Corporation v. United States*, No. 95-1366, 1996 U.S. App. Lexis 6368 (Fed. Cir. Mar. 22, 1996) (App. 1). The basis for the Federal Circuit's decision was *General Motors* and the decision of its predecessor court in *United States v. Mast Indus., Inc.*, 668 F.2d 501 (CCPA 1981).

It is well established that Customs classification is a question of law subject to *de novo* review. *Marcel Watch Co. v. United States*, 11 F.3d 1054, 1056 (Fed. Cir. 1993). Establishing the correct classification involves two questions: first, the meaning of the tariff provision and, second, whether the merchandise comes within the meaning of the properly construed provision. The first issue is a question of law subject to *de novo* review. The second issue is a question of fact reviewed for clear error. *Digital Equipment Corp. v. United States*, 889 F.2d 267, 268 (Fed. Cir. 1989).

REASONS FOR GRANTING THE WRIT

This case is very important to the importing community and presents a question of first impression to this Court. The administration of the tariff laws has a direct and significant impact on businesses throughout the United States. This Court has previously recognized the importance of the tariff laws when deciding whether to grant a petition for a writ of *certiorari*. *See, e.g.*, *Barr v. United States*, 324 U.S. 83, 85 (1945); *United States v. Bush & Co.*, 310 U.S. 371, 375-76 (1940).

Chrysler submits that the decision of the Federal Circuit requires review by this Court because it is based on two errors of law. First, the Federal Circuit ignored the plain meaning of the statute and basic principals of statutory construction long established by the Supreme Court. Specifically, the Federal Circuit's method of statutory interpretation is in conflict with this Court's instructions that, *inter alia*, unambiguous statutes are to be construed as written, *United States v. Turkette*, 452 U.S. 576, 580 (1981), that all words in a statute are to be given meaning, *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995), and that an interpretation leading to absurd results is to be avoided, *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

The Federal Circuit's departure from the methods of statutory interpretation sanctioned by the Supreme Court gives Customs unprecedented latitude in its interpretation of the *Harmonized Tariff Schedule* and, as a result, eliminates uniformity and predictability in Customs' application of the tariff laws. This will have a significant negative impact on the ability of importers to calculate the cost of their business operations and will

prevent the Customs from predictably administering the tariff laws.

Second, the Federal Circuit erred in failing to give effect to the plain meaning of 19 C.F.R. § 10.16(b) which Customs promulgated in a rulemaking process including public notice and comment. The longstanding regulation states without ambiguity that preservative painting is an acceptable operation within the context of a claim for the partial duty exemption. The Federal Circuit erroneously read the regulation to include a limitation that preservative painting operations also must be "minor" in nature to qualify under 9802. This is in conflict with decisions of this Court holding that administrative regulations are to be enforced consistent with their plain language. *Thomas Jefferson Univ. v. Shalala*, 129 L.Ed.2d 405, 415 (1994); *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988).

In addition, the Supreme Court should grant this petition for the practical reasons that this case presents the opportunity for the Court to settle presently unclear federal law and avoid continuing litigation before the Court of International Trade and the Federal Circuit. The Supreme Court has never reviewed a determination of import duties first made in the Court of International Trade and has never addressed any provision of the HTSUS. By accepting this petition, the Court will once again be recognizing the importance of international trade to the United States economy and providing renewed uniformity and predictability in international trade for United States manufacturers and importers.

I. The Federal Circuit's Decision Conflicts with Established Principles of Statutory Construction

Subheading 9802, when read to give effect to its plain meaning, defines painting as an operation that is incidental to assembly. The established rules of statutory construction, without resort to the legislative history or policy arguments, show that Congress intended to permit painting as part of foreign assembly operations without affecting the dutiable status of United States-origin components. The following sections A through D confirm that the Federal Circuit failed to apply the rules of statutory construction and, as a result, reached a conclusion inconsistent with congressional intent as embodied in the plain meaning of the statute.

A. Neither Legislative History Nor Policy Considerations Overcome the Clear Statutory Language

The Federal Circuit did not apply the maxims that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992), and that where the language of a statute "is plain, 'the sole function of the court is to enforce it according to its terms.'" *United States v. Ron Pair Ent.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). In short, if the intent of Congress is clear, that is the end of the matter; the court must give effect to the unambiguously expressed intent of Congress. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988).

Where, as here, an application of the rules of statutory construction show that there is no ambiguity in the

statute, a court may consider legislative history only to determine whether there is a clearly expressed legislative intention contrary to the statute. That review, however, does not start from a neutral viewpoint. The party challenging the plain meaning must make "an extraordinarily strong showing of clear legislative intent in order to convince [the Court] that Congress meant other than what it ultimately said." *Gardner v. Brown*, 5 F.3d 1456, 1459-60 (Fed. Cir. 1993), *aff'd*, 115 S. Ct. 552 (1994). The government made no such showing below. The Federal Circuit, therefore, erred when it resorted to legislative history to read a limitation into the clearly expressed statute. In this case, there is no limitation in the statute, either express or implied, such as that inferred by the Federal Circuit relating to "minor." *See Chrysler*, No. 95-1366 at 4 (App. 4). We respectfully submit that the Supreme Court should review the decision of the Federal Circuit in order to reaffirm the supremacy of statutory language in the process of interpretation.

B. The Federal Circuit's Interpretation of HTSUS Subheading 9802 Renders Some of Its Words Redundant

A court should avoid reading a statute in a way that renders some words altogether redundant. *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995). In spite of this rule, the Federal Circuit's interpretation of 9802, renders the phrase "such as cleaning, lubricating and painting" completely without meaning. It is, therefore, incorrect.

Besides assembly, the statutory language permits "operations incidental to the assembly process such as cleaning, lubrication and painting." HTSUS subheading 9802.00.80. In *Chrysler*, No. 95-1366 at 4 (App. 4), and

General Motors, 976 F.2d at 720 (App. 20), the Federal Circuit read this language as subject to the additional and highly subjective limitation that incidental operations be "minor" in nature within the meaning of *United States v. Mast Indus., Inc.*, 668 F.2d 501, 506 (1981).

This reliance on *Mast*, however, is misplaced because that case did not address the meaning of the listed exemplars. Congress added the phrase "such as cleaning, lubricating and painting" to "enlarge" the scope of the statutory duty exemption. S. Rep. No. 530, 89th Cong., 1st Sess. 34, *reprinted in*, 1965 U.S. Code Cong. & Admin. News 3416, 3449. The Federal Circuit, however, treated the amendment as merely a list of potentially incidental operations. *General Motors*, 976 F.2d at 720 (App. 20). That construction of the amendment renders it meaningless because it adds nothing to the scope of the statute which already permitted "operations incidental to the assembly process." The only way to give meaning to the exemplars is to read them as operations that Congress defined as incidental to assembly.

Further, the Federal Circuit should not have treated the exemplars as limited to minor operations by the word "incidental." Rather, under the canon *ejusdem generis*, "incidental" is limited to operations similar in nature to painting, cleaning and lubricating. The Federal Circuit has inverted this canon and, as result, effectively removed the exemplars from the statute.

Congress did not do a useless act when it added the exemplars to 9802. Accordingly, we urge the Supreme Court to consider the principles of statutory construction it applied in *Gustafson* and many other cases and find that the Federal Circuit's approach to statutory construction should be reviewed on a writ of *certiorari*.

C. The Federal Circuit did not Read 9802 *In Pari Materia* with Similar Language in the Tariff Schedule

The *General Motors* ruling is also at odds with the canon of statutory construction that courts are to give identical language the same meaning throughout a statute. *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

The HTSUS contains many instances of general language followed by specific exemplars. Many of those use "such as" before the exemplars. Under the Federal Circuit's decision in *General Motors*, Customs may construe exemplars in the HTSUS not as items or processes determined by Congress to fit the meaning of the general language, but merely as exemplars that Customs *may* find fit the general description *provided* they meet additional and possibly unknown conditions Customs has decided to impose. *See General Motors*, 976 F.2d at 719 (App. 20). *Chrysler* and *General Motors*, in effect, give Customs discretion in reading the HTSUS beyond that intended by Congress and take certainty and predictability away from importers.

An example of this is Note 1(p) to HTSUS Chapter 95 which states that "This chapter does not cover . . . [s]ports craft such as canoes and skiffs (chapter 89). . . ." Under this Note, Customs may not classify canoes and skiffs in HTSUS Chapter 95 but must classify them as sports craft in Chapter 89. The proper role for Customs is to decide whether imported merchandise fits within the meaning of an exemplar. Customs, therefore, may ask whether the article is a canoe but may not add limitations to the type of canoes which are to be classified in

Chapter 89. Customs cannot, for example, exclude fiberglass canoes or six-person canoes from the operation of the Chapter Note. Nevertheless, the construction the Federal Circuit has adopted permits such inconsistent and unpredictable applications of the tariff laws. The decision of the Federal Circuit, therefore, should be reviewed so that this Court may prevent any further erosions of the clarity of the HTSUS.

D. The Federal Circuit's Reading of 9802 Produces Absurd Results and Cannot be Fairly Administered

The Supreme Court has long held that courts must avoid any reading of a statute that leads to absurd results when the courts can give the statute a reasonable application consistent with its words and legislative purpose. *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940). The Federal Circuit ignored this rule when it adopted a reading of 9802 that leads to absurd results.

In *General Motors* and *Chrysler*, the Federal Circuit looked at, *inter alia*, the relative value of the investment in machinery and equipment in the assembly plant paint shop as compared with the body shop to determine whether painting is a "minor" operation. *General Motors*, 976 F.2d at 721 (App. 24); *Chrysler*, No. 95-1366 at 3 (App. 3). An investment in new painting equipment, therefore, could render a previously incidental, or "minor," painting process no longer incidental to assembly. *General Motors*, 976 F.2d at 722 n.2 (Nies, dissenting) (App. 29). Over the life of an assembly plant, Customs could periodically deem painting operations to be nonincidental depending on plant investment and depreciation. Consequently, the dutiable status of the imported

product would change over time though the fundamental nature of the process at issue—painting—remains unchanged. This discriminates against companies, such as Chrysler and General Motors, that have expensive, modern, environmentally responsible paint shops in their assembly plants while favoring assemblers with antiquated paint facilities.

Another reason this interpretation of the statute leads to absurd results is the fact that it may be impossible for an importer to know whether its products will qualify for 9802 treatment. Where the importer is not related to the foreign assembler, the importer may have no way of knowing how the investment in the machinery that performs the challenged operation compares with the investment in other machinery and equipment used in the assembly process. Even where it has access to this information an importer may need an extensive and costly analysis of actual cost data to be able to verify those claims for the partial duty exemption. *See, e.g.*, *Chrysler*, 20 CIT at ___, slip op. at 7 (App. 13). That cost data may not be available until after the importation has occurred. Finally, the burden on Customs will increase to the extent that it must now review and verify that data to determine whether painting is a "minor" operation.

The simplest and most logical way for the Court to avoid these problems is to apply the statute the way Congress wrote it. In order to fulfill Congressional intent, Chrysler asks that this Court grant this petition for a writ of *certiorari* and review the interpretation the Federal Circuit has given 9802.

II. The Federal Circuit Ignored the Plain Language of the Applicable Customs Regulation Permitting Preservative Painting

The Supreme Court has established that properly promulgated substantive agency regulations have the force and effect of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 1(1979). According to *United States v. Nixon*, 418 U.S. 683, 696 (1974), so long as a regulation remains in effect, the agency and the United States are "bound to respect and to enforce it." Customs, like all other federal agencies, must abide by its own regulations. *Fort Stewart School v. Federal Labor Relations Auth.*, 495 U.S. 641, 654 (1990).

The regulation, 19 C.F.R. § 10.16(b), states that operations incidental to assembly "shall not preclude" the application of the partial duty exemption and that "[t]he following are examples of operations which are incidental to the assembly process . . . [a]pplication of preservative paint. . . ." There is no qualification relating to painting other than that it be preservative. Thus, the application of preservative paint is by definition an operation incidental to assembly. In *Chrysler*, the Court of International Trade found that the painting operation is primarily preservative in nature. *Chrysler*, 20 CIT ___, slip op. at 5-6 (App. 11-12).

The Federal Circuit, however, agreed with Customs that the regulation includes a limitation requiring not only that painting be preservative but also that its application be a "minor" process. *Chrysler*, No. 95-1366 at 5 (App. 5). This conclusion is at odds with the plain meaning of the regulation. An agency's interpretation of its regulations is not entitled to judicial deference when it is inconsistent with the plain meaning of the regula-

tion. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1987). Where an agency's interpretation of its regulations does not "sensibly conform to the purpose and wording of the regulations" the Court should give it no credence. *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of Am., Inc.*, 423 U.S. 12, 15 (1975). Based on these controlling precedents, Chrysler submits that the Federal Circuit has impermissibly allowed Customs to amend an otherwise clear regulation without first engaging in the required process of public notice and comment. The Federal Circuit has also sanctioned an agency's reading of a regulation that is at odds with its language.

This decision undermines the effectiveness of the trade laws by removing an easily administrable test that had predictable results for the specified incidental operations. Predictability is necessary for the orderly conduct of business. *Hemschmeidt Corp. v. United States*, 72 F.3d 868, 872 (Fed. Cir. 1995). Creating an easily administered test was the purpose for the amendment which added the disputed language to the predecessor statute. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. 48 (1965) (ambiguity in the prior law resulted in "undue administrative burdens on customs officers."). It was also the reason Customs adopted a regulation setting out a bright line test for acceptable incidental operations such as painting. A grant of *certiorari* will give the Supreme Court the opportunity to fulfill congressional intentions by reversing the decision below, providing business certainty and reducing the administrative burden upon importers and Customs.

III. Review by the Supreme Court is Necessary to Eliminate Uncertainty and Avoid Repetitive Litigation

The importance of this case to the importing community is clear from the value of the 9802 benefits to industry. In 1990, one of the years at issue in this case, $1.8 billion in transportation equipment (including cars and trucks) entered the United States under 9802 just from Mexico. *Production Sharing: Use of U.S. Components and Materials in Foreign Assembly Operations, 1990-1993*, U.S. Int'l Trade Comm. Pub. 2886, 1993 Annual Report Investigation No. 332-237, Table 2-3, p. 2-6 (1995). The automobile industry is not alone in its reliance on 9802. In 1993, for example, $12.1 billion in electronic equipment entered the United States claiming the benefit of 9802 with the value of United States-origin components exceeding $5.2 billion. *Id.* at Table 2-4, p. 2-9. Also in 1993, the nonautomotive machinery industry relied on the re-importation of American-made materials under 9802 for a duty savings of $94.6 million. *Id.* at Table 2-8, p. 2-15. Finally, the use of 9802 in the textile, apparel and footwear industry is substantial. In 1993, the total 9802 duty-free value of American-made components imported was $3.48 billion, *Id.* at Table 2-10, p. 2-20, with a total duty savings $591.8 million, *Id.* at Table 2-11, p. 2-20. These figures underscore what the Supreme Court has previously recognized: the importance of the calculation of import duties as a reason for granting a writ of *certiorari*. *Barr v. United States*, 324 U.S. 83, 85 (1945); *United States v. Bush & Co.*, 310 U.S. 371, 375-76 (1940).

An importer dissatisfied with Customs' classification of merchandise may challenge that decision through an administrative protest. 19 U.S.C. § 1514(a)(2). Jurisdic-

tion to review Customs' denial of a protest rests exclusively with the Court of International Trade, 28 U.S.C. § 1581(a), and appellate review is exclusively within the jurisdiction of the Federal Circuit, 28 U.S.C. § 1295(a)(5). Consequently, it is impossible for this issue to come before the Supreme Court with a split of authority in the regional circuits.

Despite the lack of a split among the circuits, among the federal judges who have considered this issue, there is a conflict as to the correct reading of the statute. In her dissent in *General Motors*, former Federal Circuit Chief Judge Nies looked at the same language in the predecessor statute and stated that "the specific mention of painting is at a minimum a strong indication that the type of painting in issue is the exact type of activity [the statute] was amended to allow." *General Motors*, 976 F.2d at 721 (App. 27). Similarly, Judge Tsoucalas of the Court of International Trade held that the language in the statute was sufficiently clear to evidence a congressional intention to include painting in the class of operations that is incidental to assembly. *General Motors Corp. v. United States*, 15 CIT 372, 379-80, 770 F. Supp. 641, 647 (1991) (App. 45-46).

Judge Restani's opinion for the Court of International Trade clearly shows her view that the Federal Circuit's decision in *General Motors* is based on an incorrect interpretation of the statute and results in a test that is unworkable. Judge Restani stated that:

> Painting operations that are such an integral part of the assembly process, as the painting processes at issue here, may have been intended by Congress to be found "incidental to assembly." The plain terms of the statute support such a

> reading and Congress may have intended to draw a clearer line than the courts are recognizing. The result of such a line would be a more administrable statute and the fulfillment of the Congressional intent to promote the use of United States made components in assembly abroad.

Chrysler, 20 CIT at ___, slip op. at 7 (App. 12-13) (citations and footnotes omitted). Finally, it is significant that the Federal Circuit based its decision in part on that court's rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *in banc*. *Chrysler*, No. 95-1366 (App. 6). This may indicate less than complete confidence in the legal determination and a greater desire that the issue be decided consistently within the Federal Circuit.

There is, therefore, a degree of judicial skepticism that this issue has been properly and finally decided. This fact and the value of 9802 benefits as discussed above are reflected in the number of cases importers have filed before the Court of International Trade seeking to raise the same or similar issues regarding 9802. General Motors has two cases on the docket of the Court of International Trade (Court Numbers 93-10-666 and 95-6-00754). In addition, several nonautomotive companies have similar issues before that court including Levi Straus & Co. (Court Nos. 93-11-00726 and 95-01-00008), Hagar Apparel (93-06-00343), Spencer Industries (Court No. 94-12-00754) and Cygene Design (Court No. 95-06-794). By accepting this case for review, the Supreme Court will finally resolve the lingering questions of the correct interpretation of 9802 and 19 C.F.R. § 10.16(b) and, as result, remove the need for repetitive litigation.

CONCLUSION

International trade is important at all levels of American business. This case is of particular interest to American-based manufacturers of parts and components sent to foreign assemblers and manufacturers. This case is also important to United States-based vertically integrated multinational companies that retain highly technical part and subassembly production jobs in the United States while employing final assembly labor throughout the world. These United States manufacturers are engaging in the practice Congress intended to protect and foster when it enacted 9802 and amended it to cover the very issue presented in this case. The Customs Service, however, has cut the congressional policy out from under 9802 by adding new and indefinite limitations to its application.

The law is clear. HTSUS subheading 9802 identifies painting as an operation that Congress deems incidental to foreign assembly operations. To find otherwise removes all meaning from the word and would be inconsistent with the language of other provisions of the tariff schedule. Thus, in *General Motors,* the Federal Circuit incorrectly misinterpreted the statutory language and led the Court of International Trade to sustain Customs' determination. We submit that the Supreme Court should grant *certiorari* to correct the Federal Circuit's ruling which is inconsistent with many Supreme Court decisions regarding the interpretation of statutes.

The Customs Regulations specifically permit an importer to conduct preservative painting operations as part of a foreign assembly operation. 19 C.F.R. § 10.16(b)(3). The Court of International Trade found as a fact that the painting operations performed in Mexico on the compo-

nents at issue are overwhelmingly preservative in nature. Accordingly, the Court of International Trade's decision upholding Customs' denial of 9802 treatment for those parts and the Federal Circuit's affirmation is not consistent with the plain language of the regulation. The Supreme Court should grant *certiorari* to correct the Federal Circuit's failure to give proper weight to the plain meaning of a clear regulation.

Finally, the Supreme Court should again recognize the importance of import duties to American business and agree to review this case to restore uniformity and predictability to this area of law. A clear statement from the Court on the proper interpretation of 9802 and 19 C.F.R. § 10.16(b) will permit United States manufacturers selling parts to foreign assembly operations and United States companies with assembly plants throughout the world to plan their business activities with reliability and exactness. The added clarity of a Supreme Court decision will also likely eliminate the need for future litigation including those cases pending before the Court of International Trade.

Respectfully submitted,

ROBERT E. BURKE
(Counsel of Record)
DONALD J. UNGER
LAWRENCE M. FRIEDMAN
BARNES, RICHARDSON & COLBURN
200 East Randolph Drive
Suite 7920
Chicago, Illinois 60601
(312) 565-2000
Attorneys for Petitioner

June 19, 1996

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

95-1366

CHRYSLER CORPORATION,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: March 22, 1996

Before: NEWMAN, MAYER, and LOURIE, *Circuit Judges*.

LOURIE, *Circuit Judge*.

DECISION

Chrysler Corporation appeals from a judgment of the United States Court of International Trade denying Chrysler duty-free treatment for certain sheet metal components that were manufactured in the United States and assembled into motor vehicles abroad before re-entry into the United States. *Chrysler Corp. v. United States*, No. 92-01-00005-S, 1995 Ct. Intl. Trade LEXIS 66 (Ct. Int'l Trade Mar. 14, 1995). Because Chrysler has not demonstrated error in the court's decision, we *affirm*.

DISCUSSION

Chrysler manufactured sheet metal parts in the United States for use in the production of motor vehicles. The parts were then shipped to two plants in Mexico, where they were assembled with other components into finished motor vehicles. During the assembly operation, the sheet metal parts were painted by a multi-step process that involved applying zinc phosphate, primer, sealant, antichip coating, color coats, and an outer clear coat sealant.

Upon re-entry of the completed vehicles into the United States, Chrysler sought a tariff allowance for the value of the sheet metal components. Chrysler relied on item 9802.00.80 of the Harmonized Tariff Schedule of the United States (1990) ("HTSUS"), which provides a duty exemption for components that meet the following criteria:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) *have not been advanced in value or improved in condition abroad except by operations incidental to the assembly process such as cleaning, lubricating and painting*. [Emphasis added].

Item 9802.00.80, HTSUS. The United States Customs Service ("Customs") denied Chrysler a duty exemption, asserting that the sheet metal parts had been "advanced in value" and thus were dutiable. After its administrative protest was denied, Chrysler filed suit in the United States Court of International Trade challenging Customs' denial of a trade allowance for the disputed parts.

The court, applying *General Motors Corp. v. United States*, 976 F.2d 716 (Fed. Cir. 1992), entered judgment for the United States. The dispositive issue, the court stated, was whether the painting operations as a whole were of a "minor nature" so as to fall within the "incidental to the assembly process" exception under item 9802.00.80, HTSUS.* The court stated that, consistent with *General Motors*, two factors were relevant to this question: (1) a comparison of the cost of painting operations to the cost of the affected components, and (2) a comparison of the investment in painting operations to the investment in the body shop. The court found that these factors did not favor Chrysler, because the painting operations as a whole accounted for 30-40% of the total cost of the affected components, and the capital investment in paint shop operations was substantial compared to body shop investment. The court therefore held that the painting operations at the Mexican assembly plants were not "minor" and thus were not "incidental to the assembly process." Accordingly, the court entered judgment for the United States.

Chrysler raises three principal arguments on appeal. First, Chrysler contends that item 9802.00.80, HTSUS, itself provides that all painting operations are "incidental to the assembly process" without regard to quantitative or qualitative comparisons between the painting and

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* It was not disputed that the components had been exported in condition ready for assembly without further fabrication and that they had not lost their physical identity. *See* item 9802.00.80, HTSUS. It was also not disputed that the parts had been "advanced in value," unless the painting operations were determined to have been "incidental to the assembly process."

other operations. Second, Chrysler argues that 19 C.F.R. § 10.16 (1990) specifies that primarily preservative painting operations will be treated by Customs as "incidental to the assembly process." Thus, because the court found that 70% of the overall painting operations for both Mexican plants were for preservative purposes, Chrysler contends that the court should have held that the painting operations met the requirements for the exemption under item 9802.00.80, HTSUS. Third, Chrysler asserts that the court misapplied *General Motors* when it did not consider the factual distinctions between that case and Chrysler's and rejected other bases for comparing the painting and assembly operations.

The government responds, *inter alia*, that our decision in *General Motors* controls this case and mandates an affirmance of the court's decision. We agree with the government. In *General Motors*, we held that, consistent with the decisions of our predecessor court, only minor operations incidental to assembly may be given duty-free treatment under item 807.00, Tariff Schedules of the United States (1986) ("HTSUS"), the predecessor to item 9802.00.80, HTSUS. *General Motors*, 976 F.2d at 719-20. The legislative history supported our interpretation of the tariff provision. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965); *see also United States v. Mast Indus., Inc.*, 69 C.C.P.A. 47, 668 F.2d 501, 506 (CCPA 1981) ("Operations [such] as applying preservative coatings and testing and adjusting the components are incidental to the assembly process 'if of a minor nature.'") (quoting legislative history). We rejected General Motors' argument that, under the plain language of the statute, all painting operations are "incidental to the assembly process." Rather, we held that "the statute's reference to 'painting'

is simply an exemplar of an operation which is potentially 'incidental to the assembly process,' not a definitive statement that all painting operations, no matter how extensive, are allowed under item 807.00(c)." *General Motors*, 976 F.2d at 719.

Here, as the Court of International Trade recognized, there are no relevant differences between the tariff provision interpreted in *General Motors*, item 807.00, HTSUS, and item 9802.00.80, HTSUS. Thus, Chrysler's first argument, that the plain language of the statute mandates a duty exemption, was rejected by the court in *General Motors*.

In addition, we cannot accept Chrysler's contention that the court misapplied 19 C.F.R. § 10.16. Although the regulation arguably suggests that primarily preservative painting operations may be treated by Customs as "incidental to the assembly process," the regulation must be read in light of *General Motors*. Thus, as the court stated, even though a painting process may have an overall preservative purpose, it will be dutiable if it is not "minor" in terms of the cost comparisons found determinative in *General Motors*. The court did not err in finding that these cost factors were not in Chrysler's favor. Further, the regulation itself provides that "any *significant* process, operation, or treatment . . . shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article (emphasis added)." 19 C.F.R. § 10.16(c). As an example of a nonexempt operation, the regulation lists "painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics." 19 C.F.R. § 10.16(c)(3). Chrysler has not persuaded us that its painting operations were not significant or that

they were not primarily intended to enhance the appearance of or to impart distinctive characteristics to the sheet metal parts.

Furthermore, since we conclude that the court correctly applied *General Motors*, we also reject Chrysler's contention that the court erred in not considering any factual distinctions between Chrysler's case and *General Motors* and in rejecting other possible bases for comparing the painting and assembly operations. We have considered Chrysler's remaining arguments, but find them unpersuasive.

Thus, because "this court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned *in banc*," *Newell Cos. v. Kenney Manufacturing Co.*, 864 F.2d 757, 765, 9 U.S.P.Q.2D (BNA) 1417, 1423 (Fed. Cir. 1988), *cert. denied*, 493 U.S. 814, 107 L. Ed. 2d 30, 110 S. Ct. 62 (1989), and this case is controlled by our interpretation of the comparable relevant tariff provision in *General Motors*, we affirm the decision of the Court of International Trade.

App. 7

[Dated March 14, 1995]

UNITED STATES COURT OF INTERNATIONAL TRADE

CHRYSLER CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.	Court No. 92-01-00005-S

[Judgment for defendant.]

Barnes, Richardson & Colburn (*Robert E. Burke, Donald J. Unger* and *Lawrence M. Friedman*) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*) for defendant.

OPINION

RESTANI, Judge: This matter is before the court for decision following trial. The issue is whether certain fabricated sheet metal components of automobiles and trucks, that were coated with finish paint in connection with assembly in Mexico, are entitled to duty-free treatment under item 9802.00.80 of the Harmonized Tariff

Schedule of the United States ("HTSUS").[1] This issue was for all intents and purposes resolved in *General Motors Corp. v. United States*, 976 F.2d 716 (Fed. Cir. 1992), in which the predecessor statute was applied. *Id.* at 720-21 (finding finish coat painting operations for sheet metal components of automobiles not "incidental to the assembly process," and thus not entitled to duty exemption as American Goods Returned). There are no relevant differences in the current statute. Furthermore, the holding of the Federal Circuit in *General Motors* renders nondeterminative the factual distinctions established by plaintiff.

This matter is best explained by first describing plaintiff's assembly process, which is similar for both the Toluca car plant and the Lago Alberto truck plant in Mexico.[2] All of the components at issue were manufac-

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[1] The HTSUS provides in pertinent part:

9802.00.80 Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

HTSUS, USITC Pub. 2232, sec. XXII, ch. 98, subch. II, item 9802.00.80 (Supp. 2 1990); *id.*, USITC Pub. 2030, sec. XXII, ch. 98, subch. II, item 9802.00.80 (Supp. 4 1989).

[2] As part of the trial of this matter, the court viewed both assembly operations located in Mexico. The models involved are the K-body car (Dodge Aries, Plymouth Reliant), the

(continued...)

tured in the United States. In the initial stages of assembly, sheet metal components are welded together in the body shop. A metal finishing operation takes place to locate and detect any defects and to prepare the body for painting. The parties disagree as to whether metal finishing is part of the painting process. Although it appears more closely related to the painting process, resolution of this matter is not dispositive. The disputed processes all occur in connection with the paint operation. This begins with cleaning, a phosphate application to prepare the metal body for primer, some sealing, anti-chip coating application, baking, application of one or two color coats and a clear coat, followed by more baking.[3]

Following the painting operations, the body travels to the trim line where various trim components and subassemblies thereof are added to the body, such as instrument panels and window controls. Towards the end of the car assembly process, the engine and other essential components are mounted to the body. In the truck plant, the chassis is assembled separately and is joined with the trimmed body. Throughout the process various inspections take place and the entire assembly ends with final testing.

There is no dispute that the components at issue were exported in condition ready for assembly without further

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[2] (...continued)
Chrysler LeBaron, the Dodge Ramcharger and the Dodge Clubcab. The last two are assembled at the Lago Alberto plant.

[3] The sealing operations observed by the court appear more related to the assembly process than to painting, but the parties did not discuss this distinction.

fabrication, that they have not lost their physical identity, and that they have been advanced in value or improved in condition. *See* Item 9802.00.80, HTSUS. Furthermore, as in *General Motors*, *see* 976 F.2d at 720, there is no doubt that the painting must be done after welding and before trimming, so that the painting operations are clearly an essential part of the assembly process.[4] Thus, the question that remains, according to *General Motors*, is whether the painting process as a whole is of a "minor nature." *Id.*

Plaintiff cannot succeed in this matter because, in relation to auto assembly, the *General Motors* court found two factors dispositive: (1) comparison of the cost of painting operations to the cost of the affected components, and (2) comparison of investment in painting operations to the investment in the body shop. *See General Motors*, 976 F.2d at 720-21. Those factors are not in plaintiff's favor here. First, the painting process as a whole accounts for between 30 and 40 percent of the total cost of the affected components[5] and the capital in-

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[4] Painting must take place after welding to avoid disruption of the anti-corrosive paint film by the welding process. Painting also cannot be performed at the end of the assembly process because, among other problems, baking would warp or melt various parts. In addition, there would be a loss of anti-corrosive coverage of the substrate.

[5] *See* Def.'s Ex. U. The court finds defendant's Exhibit U more accurately reflects the cost of painting in comparison to the affected components than does any part of plaintiff's Exhibit 18. Even granting plaintiff's arguments on metal finishing some credence, it is unlikely that the painting to body shop percentages would fall below 25%. *See id.* and testimony of Efrain Pena as to percentage changes to plaintiff's figures, adjusting for defendant's view of metal finishing.

vestment in paint shop operations is substantial in comparison to body shop investment. While paint investment is not five times greater as it was in *General Motors*, 976 F.2d at 721, paint investment still equals or exceeds that of the body shop. *See* Pl.'s Ex. 18. Under these criteria, painting operations at the Mexican assembly plants are not of a minor nature.

Plaintiff raises another issue that was not discussed in *General Motors*, but was an issue in that case as well. Under 19 C.F.R. § 10.16(c) (1990), examples of dutiable operations considered by Customs not to be "incidental to the assembly process" include painting operations primarily intended to enhance the appearance of an article.[6] Thus, here Customs did not duty components which were primed, but not finish coated. Plaintiff argues that the entire painting process is a preservative paint system and is not dutiable under the regulation.[7] The court agrees that plaintiff established at trial, through the testimony of Dennis P. Coleman, that approximately 70 percent of the entire paint system for both Mexican plants is intended primarily for preservative purposes.[8] As to the top coats, it is impossible to separate their

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[6] Under 19 C.F.R. § 10.16(b), preservative painting is an example of a non-dutiable operation, when performed as part of the assembly process.

[7] *General Motors*, 976 F.2d at 720, directs that to qualify for duty-free treatment, the entire advancement by the coating operations is to be considered, not simply the top coats.

[8] Contrary to defendant's contention, Customs' prior factual findings are entitled to no weight. Actions under 28 U.S.C. § 1581(a) (1988), such as the case at hand, are tried *de novo*. 28 U.S.C. § 2640(a)(1) (1988); *see ITT Corp. v. United States*, 24 F.3d 1384, 1389 (Fed. Cir. 1994); *China Diesel Imports, Inc. v. United States*, 855 F. Supp. 380, 385 (Ct. Int'l Trade 1994).

appearance-enhancing features from their preservative functions. Indeed, any preservative coating, like most painting, is intended to maintain both structural integrity and a more superficial appearance. Besides providing sealing, the top coats contain ultraviolet absorbers and free radical scavenger substances to prevent the breakdown of the underlying anti-corrosives, according to the testimony of Dr. Clifford Schoff. Nonetheless, plaintiff cannot succeed. Under *General Motors*, the question still remains—is the entire painting process of a minor nature.[9] In order to apply *General Motors*, the regulation must be read as qualified by this test. Accordingly, even though a painting process has an overall preservative purpose, it will be dutiable if it is not "minor" in terms of the cost comparisons found determinative in *General Motors*. As indicated, the cost of the painting and the investment involved are not minor in relation to the cost and investment for the affected components.

Having arrived at this conclusion, the court notes that this approach raises several concerns that are pointed out by the dissent in *General Motors*. *See* 976 F.2d at 721-23. Painting operations that are such an integral part of the assembly process, as the painting processes at issue here, may have been intended by Congress to be found "incidental to assembly." *Id.* at 722. The plain

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[9] The court rejects defendant's argument that because substantial corporate time is spent on the marketing issues involving color choice, painting operations are not minor. Marketing issues affect the entire automobile, including the shape of the affected sheet metal components. There was no evidence on the amount of marketing effort spent on non-painting elements. Thus, no comparisons are possible as to marketing.

terms of the statute support such a reading and Congress may have intended to draw a clearer line than the courts are recognizing.[10] The result of such a line would be a more administrable statute and fulfillment of the Congressional intent to promote use of United States made components in assembly abroad.[11] In this case, auditors for each side performed studies requiring approximately 700 hours each in an attempt to determine if the painting operations were of a "minor nature," a somewhat nebulous test.

The *General Motors* court found sub-tests measuring the value or cost of painting operations in comparison to the entire assembly of the imported article, tests that largely favor the assembler, to be of "little weight." *See* 976 F.2d at 720 (discussing specifically time and labor

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[10] The court notes that the legislative history is more ambiguous and is not inconsistent with the *General Motors* interpretation. *See* H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965). The *General Motors* majority adopts the word "minor," which is found in the legislative history, and makes it part of the statutory test. The dissent focuses only on the statutory term "incidental," and its meaning as subordinate or occurring as a consequence of, although the word "incidental" has several meanings, including "occurring as a minor concomitant." *Webster's Third New International Dictionary* 1142 (Philip Babcock Gove et al. eds., 1981).

[11] Customs' regulation is directed towards establishing a clearer test. "Painting" in the statute, however, is not defined as "non-decorative preservative painting." *See* Item 9802.00.80, HTSUS; *see also* 19 U.S.C. § 1202 (1988). Thus, to this court, the regulation appears to be inconsistent with the statute, and would be entitled to no deference. Of course, the regulation may be inconsistent with the statute, as interpreted by *General Motors,* if it exempts all "preservative" painting, no matter how costly. 976 F.2d at 719-20.

comparisons).[12] The tests chosen in *General Motors* for this product do not favor plaintiff. Why the tests relied upon in *General Motors* are particularly determinative as to painting operations that are integral to assembly is not clear to the court. Cases such as *United States v. Mast Indus., Inc.*, 668 F.2d 501 (C.C.P.A. 1981) (buttonholing and pants pocket slitting operations), and *United States v. Oxford Indus., Inc.*, 668 F.2d 507 (C.C.P.A. 1981) (buttonholing operation), in which various cost comparison tests are set forth, and which the *General Motors* court found applicable, *see* 976 F.2d at 719-20, may not in actuality provide much guidance, as they do not treat "cleaning," "lubricating" or "painting" processes, as set forth in the statute.

Judge Nies, in dissent in *General Motors*, indicated that if a painting operation must be done as an integral part of the assembly process, it is incidental to assembly and the affected components are not dutiable. 976 F.2d at 722-23. This is an appealing interpretation of the statute, for the reasons set forth, but it is not the current law. Accordingly, judgment is rendered in favor of defendant.

Jane A. Restani
JUDGE

Dated: New York, New York
This 14th day of March, 1995.

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[12] By some measures, the cost of painting operations was less than 5 percent of the total cost of the imported vehicle. The painting percentage for the Dodge Clubcab was slightly higher. *See* Pl.'s Ex. 18 (cost breakdown by vehicle type).

JUDGMENT

UNITED STATES COURT OF INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

CHRYSLER CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.	Court No. 92-01-00005-S

This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED: that judgment is rendered in favor of defendant.

Jane A. Restani
Judge of the United States
Court of International Trade

Dated: New York, New York
this 14th day of March, 1995.

United States Court of Appeals
for the Federal Circuit

91-1518

GENERAL MOTORS CORPORATION,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

DECIDED: October 8, 1992

Before NIES, *Chief Judge*, ARCHER and MAYER, *Circuit Judges*.

MAYER, *Circuit Judge*.

DECISION

The government appeals the judgment of the Court of International Trade, 770 F. Supp. 641 (1991), that certain motor vehicle components are eligible for the trade allowance provided in item 807.00, Tariff Schedules of the United States (TSUS), despite a contrary determination by the United States Customs Service. We reverse.

BACKGROUND

During 1986 and 1987, General Motors Corporation (GM) manufactured in the United States various sheet

metal components for use in the production of motor vehicles. These components were shipped to Mexico and assembled, along with other components, into finished vehicles in GM's Ramos Arizpe assembly plant.

The Ramos Arizpe assembly process is described as consisting of five operation groups: body shop, paint shop, chassis line, trim shop, and final process. In the first group, body shop, major component subassemblies are fitted together and spot welded to create the body of the automobile. In the second group, paint shop, the body is cleaned and sprayed with a protective zinc phosphate compound, submerged in an electro deposition primer tank, baked, sanded, treated with a sealant, and then baked again. This is followed by an application of surface primer. At this point, topcoat (finish) paint is applied and the body is oven cured. Finally the body is waxed and sent along to the trim shop.

In the trim shop, certain internal components are installed and water testing is performed. Next, in chassis, while the radiator, grille, and gas tank are attached to the body, the engine, transmission, and frame are independently subassembled on a separate conveyor. The body and frame are then joined, and the bumpers, radiator, and tires are installed. The last operation is final process wherein manual detail work, sundry inspections, wheel alignment, and final drive tests are performed. The finished vehicle is then reshipped to the United States for sale.

Upon the re-entry of the vehicles at issue here into the United States, GM sought a tariff allowance for the value of the sheet metal components manufactured in the United States, in accordance with item 807.00, TSUS. Customs granted allowances on some of the com-

ponents, but, in accordance with its regulation,* denied the allowance to components that had undergone topcoat (finish) painting, because:

> Finish painting vehicle parts is not of such a minor nature as to be considered incidental to the main assembly process. . . . Finish painting amounts to a fabrication that advances the vehicles in value and condition, beyond the meaning of [item 807.00].

After denial of its administrative protest, see 19 U.S.C. § 1514 (1988), GM filed suit in the Court of International Trade challenging Customs' denial of the trade allowance on the disputed components. See 28 U.S.C. § 1581(a) (1988).

On July 23, 1991, the court entered judgment in favor of GM, holding that the topcoat painting operations were minor and clearly subordinate to the assembly process

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* 19 C.F.R. § 10.16 (1986), in relevant part, provides:

> (c) Operations not incidental to the assembly process. Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under item 807.00, Tariff Schedules of the United States (19 U.S.C. 1202):
>
> * * *
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics . . . .

and, accordingly, were "incidental to assembly" as required for item 807.00 treatment. 770 F. Supp. at 648. The court ordered Customs to reliquidate the entries and refund excess duties paid, with interest, to GM. *Id.* at 642.

DISCUSSION

Item 807.00, TSUS (1986), provides that:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting [are subject to] [a] duty upon the full value of the imported article, less the cost or value of such products of the United States . . . .

Accordingly, domestic components exported for assembly and reshipped to the United States, which conform to the requirements of each subpart of item 807.00, are eligible for a trade allowance upon re-entry in an amount equal to their cost or value.

In this case, there is no question that the disputed sheet metal components were exported in condition ready for assembly without further fabrication (807.00(a)) and have not lost their physical identity in the finished motor vehicles (807.00(b)). Furthermore, the components have "been advanced in value or improved in condition abroad" by the painting operations performed in GM's Ramos Arizpe assembly plant, as contemplated by

807.00(c). Therefore, in determining whether the components qualify for the item 807.00 trade allowance, the dispositive issue is whether the painting operations fall within the scope of "operations incidental to the assembly process such as cleaning, lubricating, and painting."

GM suggests that this issue can be resolved solely by the plain language of the statute. It contends that item 807.00 "expressly enumerates painting as an acceptable operation incidental to assembly . . . [and] explicitly cover[s] the operation at issue here." We disagree. The statute's reference to "painting" is simply an exemplar of an operation which is potentially "incidental to the assembly process," not a definitive statement that all painting operations, no matter how extensive, are allowed under item 807.00(c). This interpretation is fully supported by the statute's legislative history, as set out in *United States v. Mast Indus. Inc.*, 668 F.2d 501, 505 (CCPA 1981):

> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary . . . *to paint* or apply other preservative coatings. . . . *Such operations, if of a minor nature incidental to the assembly process*, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (1965) (emphasis added). Thus, contrary to GM's suggestion, the mere fact that the disputed operations involve painting does not resolve this appeal. Instead, we must focus on whether the operations are "incidental to the assembly process" within the meaning of item 807.00(c).

Whether particular operations are "incidental to the assembly process" has been at issue before. *See, e.g., Mast*, 69 C.C.P.A. 47, 668 F.2d 501; *United States v. Oxford Indus., Inc.*, 69 C.C.P.A. 55, 668 F.2d 507 (CCPA 1981); *Miles v. United States*, 65 C.C.P.A. 32, 567 F.2d 979 (CCPA 1978). In *Mast*, the court had to determine whether buttonholing and pocket slitting operations performed upon fabric components were incidental to the assembly of women's pants under item 807.00(c). After rejecting arguments that these operations were precluded merely because they provided "independent utility" or were not essential to the assembly process, the court concluded that "operations [such] as applying preservative coatings and testing and adjusting the components are incidental to the assembly process '*if of a minor nature.*' " 668 F.2d at 506 (emphasis added); see also *Oxford*, 668 F.2d at 510. As a means of ascertaining whether "an operation of a 'minor nature' is incidental to the assembly process," the court set out the following factors:

> (1) Whether [i] the cost of the operation relative to the cost of the affected components and [ii] the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor." . . .
>
> (2) Whether the operations in question were necessary to the assembly process . . . .

> (3) Whether the operations were so related to assembly that they were logically performed during assembly.

Mast, 668 F.2d at 506. But because it identified these as "relevant factors in this case," *id.*, we do not read Mast as announcing factors that must invariably be used to the exclusion of all others, or that all such factors are pertinent in every case involving item 807.00. We believe "Congress intended a balancing of all relevant factors to ascertain whether an operation of a 'minor nature' is incidental to the assembly process." *Id.* We see this balancing process as an objective way to decide if particular operations are minor and incidental to assembly.

In applying the first part of the first *Mast* factor, the trial court said,

> The Mast court unambiguously stated that it compared the "cost of the [challenged] operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article." 69 CCPA at 54, 668 F.2d at 506.
>
> With reference to what operations are "challenged", there is no doubt that all of the operations performed in the paint shop are *not* at issue herein. Customs itself noted in its rulings that the preservative coating operations that make up the rest of the paint shop operations were in conformity with the spirit of item 807.00. Therefore, for defendant to now demand the use of cost and time figures of *all* paint shop operations when performing *Mast* comparisons is irrational. Only the figures directly attributed to the challenged finish painting operations will render a truthful computation of whether the operation is indeed of a minor nature.

770 F. Supp. at 645. The court was correct that Customs allowed GM a trade allowance on components that underwent preservative coating operations, but this appeal involves different components, those which were also subjected to topcoat painting, on which a trade allowance was denied. Accordingly, we believe that all coating operations performed upon the disputed components, including zinc phosphate, electro deposition primer, sealant, surface primer, sanding, baking, and waxing operations, are relevant and must be considered in conjunction with topcoat painting operations to determine if coating operations, collectively, are minor incidents to assembly. The piecemeal analysis adopted by the trial court undermines item 807.00 by allowing major and significant operations to be broken down to a point where each step could be called minor. The court focused on its finding that "the cost of topcoating is but a fraction, *i.e.* 14%, of the cost of the affected components." *Id.* at 646. But the appropriate cost comparison, encompassing all paint shop operations and using GM's own cost data, reveals that coating operations are nothing if not major.

In applying the second part of the first *Mast* factor, the trial court observed that "the time expended in the topcoating operations accounts for less than four [standard labor hours] out of a total assembly time of over thirty-nine [standard labor hours]." *Id.* This time comparison, like the cost comparison, improperly excludes relevant coating operations. Nevertheless, while the comparison of labor hours, or total time of the operation, undoubtedly is relevant in some cases, where the operations are complex and involve significantly automated or non-labor processes (such as baking), this factor provides little guidance on whether operations are of a "minor nature." It is entitled to little weight in this case.

On the remaining *Mast* factors, the trial court held that "[GM] has painstakingly demonstrated that for reasons of economics as well as design, the topcoating operation is most logically performed during the assembly process." *Id.* We see nothing wrong with this finding, but it does not save the case for GM.

The record demonstrates that GM's cost data on coating operations is significantly understated because its accounting methods do not fairly allocate the cost of paint shop equipment to the cost of the paint shop operations. Under GM's accounting methods, depreciation costs are allocated to each department on the basis of the standard labor hours expended in the department, not on the basis of the actual capital investment. Accordingly, this does not fairly allocate the real costs of equipment, notwithstanding that "this method of reporting time and cost is a standardized method in cost accounting for assembly operations" and is "authorized by GAAP," according to GM.

We therefore believe capital investment in paint shop operations, compared with investment in the assembly processes, is relevant in deciding whether the operations at issue are of a minor nature. GM's data shows that the capital investment in machinery and equipment in the paint shop is more than five times that in the body shop, where significant assembly operations are performed. In sum, proper application of the first *Mast* factor, and consideration of overlooked information, confirms that the paint shop operations are not within the scope of item 807.00(c).

CONCLUSION

Accordingly, the judgment of the Court of International Trade is reversed.

COSTS

General Motors Corporation shall bear the costs of this appeal.

REVERSED

United States Court of Appeals
for the Federal Circuit

91-1518

GENERAL MOTORS CORPORATION,

Plaintiff-Appellee,

v.

THE UNITED STATES,

Defendant-Appellant.

DECIDED: October 8, 1992

Nies, *Chief Judge*, dissenting.

This case involves sheet metal components manufactured by General Motors in the United States and shipped to Mexico where they and numerous other components were assembled into automobiles. Upon re-entry of the automobiles into the United States, General Motors sought to subtract the value of the sheet metal components made in the United States from the full value of the automobiles in calculating the duty owed for importing the automobiles under item 807.00, TSUS (1986). Item 807.00 permits such a duty allowance for components made here which:

> (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity . . . by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by

> being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

Item 807.00. The United States Customs Service denied allowances for sheet metal components which had been subject to topcoat painting operations in Mexico. The Court of International Trade disagreed and held that topcoating components in Mexico did not negate the deduction of the value of these parts as United States components. I agree.

The only question presented on appeal is whether the topcoated automobile components at issue have been advanced in value or improved in condition abroad by "operations incidental to the assembly process *such as cleaning, lubricating, and painting*." Item 807.00(c) (emphasis added). At the government's urging, the majority has looked to item 807.00's legislative history and the Court of Customs and Patent Appeals opinion in *United States v. Mast Indus.*, 69 C.C.P.A. 47, 668 F.2d 501 (CCPA 1981), to require that the painting operations in this case be *minor* in nature as well as "incidental to the assembly process."

Item 807.00(c) speaks of "operations incidental to the assembly process such as . . . painting." Looking to this seemingly unambiguous language, the proper inquiry in this case is whether the painting operations performed in Mexico were "incidental to the assembly process." While the majority opinion states that painting is merely listed as "an exemplar of an operation which is potentially 'incidental to the assembly process,'" item 807.00's specific mention of painting is at minimum a strong indication that the type of painting in issue is the exact type of activity 807.00 was amended to allow.

The government and the majority opinion look to our predecessor court's opinion in *Mast* as support for the requirement that the painting be "minor in nature." The operations in Mast were buttonholing and pocket slitting performed on fabric, operations not specifically mentioned in 807.00. The court looked to 807.00's legislative history in order to determine whether these operations were "incidental to the assembly process" under item 807.00(c). Such a resort to item 807.00's legislative history is not necessary in the present case—the plain language of item 807.00 governs the proper inquiry. *See United Stated v. Turkette*, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981).

In any event, to the extent that it is necessary to look to legislative history in order to further illuminate this seemingly clear provision, 807.00's legislative history explicitly names incidental painting as an operation which does not negate a duty allowance for imported components. In connection with amending 807.00 to allow the performance of certain value enhancing operations abroad, the legislative history states, "It appears that under the language of [pre-amendment] item 807.00 *minor operations such as painting incidental to assembly* abroad may be precluded, and that in certain respects the item is ambiguous, with the result that it imposes undue administrative burdens on customs officers." H.R. Rep. No. 342, 89th Cong., 1st Sess. 48 (1965) (emphasis added). Even assuming, *arguendo*, that an operation must be minor in nature to allow a duty allowance, 807.00's legislative history clearly implies, if not directly states, that painting which is incidental to assembly is inherently a minor operation.

If there is any doubt as to where the proper inquiry lies it is dispelled by close examination of the following factors used by the *Mast* court:[1] (1) whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered minor; (2) whether the operations were necessary to the assembly process; (3) whether the operations were so related to assembly that they were logically performed during assembly; and (4) whether economic or other practical considerations dictate that the operations be performed concurrently with assembly. 668 F.2d at 506 & n.7.

The first factor focuses solely on the extent of the operations, *i.e.*, whether the operations are "minor in nature," and forms the basis for the majority's opinion.[2] Concededly, an operation's being minor in nature clearly impacts upon its being "incidental to the assembly process." A very minor operation is likely to be incidental to the assembly process. This factor, however, does not stand alone as dispositive; it is to be combined with the other three *Mast* factors and any other relevant considerations

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[1] It is interesting to note that, in addition to item 807.00's plain language and legislative history, the judicial interpretation of 807.00 in Mast speaks of painting as an operation allowable under 807.00(c). 668 F.2d at 505.

[2] In addition to the "cost of the operation" and the "time required by the operation" elements under the first Mast factor, the majority looked to the amount of General Motor's capital investment in the machinery and equipment in the paint shop. I fail to see how the purchase of expensive capital equipment for whatever reasons, i.e., to increase efficiency, to cut labor costs, or to reduce employee's exposure to unsafe working conditions, changes the nature of the operation.

in determining whether an operation fits within those allowed under 807.00(c). The remaining three factors in *Mast* focus on the relationship between the operation and the assembly process in order to determine to what extent the assembly process dictated that the operation be performed abroad with the assembly. I believe these three factors lie at the heart of the inquiry in the present case.

The government suggests that the sheet metal components could have been painted in the United States and assembled in Mexico by "a nut and bolt assembly". This suggestion is so ludicrous I would have held the appeal frivolous. The process of nut and bolt automotive assembly became obsolete in the 1950's with the advent of spot welding. General Motors has clearly established that the painting operations had to be performed during the assembly process in Mexico. The components could not be painted (either undercoated or topcoated) prior to shipment to Mexico because the parts were assembled through electrical welding and the non-conductive paint would have, therefore, prevented assembly. The components could not be undercoated after the complete car was assembled because all of the sheet metal components must be undercoated in order to prevent corrosion. Likewise, the sheet metal components could not be undercoated in Mexico and topcoated (a la Earl Schieb) after importation of the automobile because: (1) the windshields were attached by adhesives which bonded only to topcoat, (2) a delay in topcoating would increase ultra violet degradation of the undercoats, and (3) trim components would have to have been removed to paint all of the surfaces which need to be topcoated. The nature of the assembly process dictated that the painting opera-

tions be performed concurrently with the assembly of the car and, therefore, the painting operations conducted in Mexico were "incidental to the assembly process." Because of the denial of the deduction for these United States components, another part of the fabrication of automobiles in the United States will likely be lost. This cannot be the intent of Congress. Accordingly, I would affirm the judgment of the Court of International Trade.

[Dated July 23, 1991]

UNITED STATES COURT OF INTERNATIONAL TRADE

General Motors Corp.,	:	
plaintiff	:	
v.	:	Court No. 87-03-00471
United States,	:	
defendant.	:	

[Case submitted for trial and heard; judgment in favor of plaintiff.]

Ross & Hardies (*Joseph S. Kaplan* and *Michelle F. Forte*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*, Senior Trial Counsel; of counsel: *Stephen Berke*, Attorney, United States Customs Service, for defendant.

OPINION

Tsoucalas, Judge: Plaintiff, General Motors Corporation ("GM"), initiated this action to challenge denial of a protest seeking item 807.00, Tariff Schedules of the United States ("TSUS"), allowances for certain domestic automobile components exported for assembly. Plaintiff avers that Customs improperly withheld the tariff adjustments because all the item 807.00, TSUS, requirements were fulfilled.

Defendant maintains that GM's petition for item 807.00, TSUS, treatment was properly denied because, in the course of the painting process, the American made components were substantially advanced in value or improved in condition in a manner that was neither minor nor incidental to assembly. Defendant supports this position by noting that pertinent cost and time comparisons demonstrate that the painting operations constitute a substantial fraction of total cost and assembly time and cannot be deemed minor and the painting operations could have readily been performed upon re-entry in the United States and therefore can not be considered incidental to assembly.

The Court, after thorough examination of the applicable law, and having carefully considered the body of evidence put forth by the parties, finds that plaintiff has adequately established the eligibility of its products for preferential tariff treatment pursuant to item 807.00, TSUS. Hence, Customs is directed to reliquidate plaintiff's entries and grant item 807.00, TSUS, allowances for the components denied such treatment due to the contested painting operations.

BACKGROUND

The merchandise at issue consists of stamped sheet metal automobile components manufactured by GM in the United States and then exported to Mexico, between 1986 and 1987, for assembly into operable motor vehicles. Upon completion, the automobiles were reentered into the United States for ultimate sale wherein plaintiff sought a tariff allowance for the value of the exported components in accordance with item 807.00, TSUS. Al-

though some allowances were granted,[1] Customs denied allowances to all components that had undergone finish painting (pigmented topcoating) because "[f]inish painting vehicle parts is not of such a minor nature as to be considered incidental to the main assembly process" and "[i]f performed abroad, finish painting amounts to a fabrication that advances the vehicles in value and condition, beyond the meaning of [item 807.00]." *Treasury Ruling Letter* 553340 (*Joint exhibit* 2).

Plaintiff subsequently commenced the instant action to challenge Customs' denial of item 807.00, TSUS, allowances for components that underwent topcoating during the assembly process. Trial was commenced in August, 1990, before Chief Judge Re. Subsequent to trial, Chief Judge Re retired from the Court and this case was reassigned to Judge Tsoucalas.

Among the witnesses that testified at trial were Mr. Robert Stramy, manager of the Ramos Arizpe plant during the time at issue, testifying on plaintiff's behalf, and Mr. Steven Pinter, a Customs law specialist employed in the Office of Regulations and Rulings at Customs headquarters, who testified for defendant.

The evidence adduced at trial indicates that the prefabricated automobile components were transported to plaintiff's Ramos Arizpe plant via rail car, where they arrived immediately ready for manufacture into motor vehicles. *Transcript* ("TR") at 20-21. Assembly was performed in five general operation groups: body shop, paint

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[1] The parties are in agreement that components that had undergone assembly and various other miscellaneous operations, but had not undergone finish painting operations, were granted item 807.00, TSUS, treatment.

shop, chassis line, trim shop and final process. *Plaintiff's Exhibit* ("Pl. Ex.") 3.

In the body shop, various major component subassemblies were fitted together and spot welded to create the carcass or body of the automobile. Mr. Stramy illustrated for the Court the complexity of the operations effected in the body shop, adding that this department not only contained the most complicated equipment but was also the most labor intensive. TR at 22-31. As explained by the witness, when the fitting and welding operations are completed, the partially assembled body travels via an overhead conveyor to the next operations group, the paint shop. TR at 31-32.

Upon arrival in the paint shop, the body is cleaned and sprayed with a protective zinc phosphate compound. Next, to further retard corrosion, the entire body is submerged in an electro deposition primer tank ("Elpo tank"), and then baked, sanded, treated with a sealant and baked again. TR at 32-33; Pl. Ex. 3B. This is followed by an application of surface primer. At this point topcoat application occurs and the body is oven cured. TR at 34. Finally the body is waxed and sent along to the trim shop. *Id.*

Once in the trim shop, the body undergoes all electrical wiring as well as the installation of the steering column, the gearshift lever and the instrument panel. Also installed while in the trim shop are the front and rear windshields, after which the body is inserted in the "water test booth" where intense rain conditions are simulated to detect any leakage problems. TR 34-36. After the water test booth, the carpets, seats, and moldings are positioned and the body is conveyed to the chassis shop.

The chassis shop is responsible for preparing the completed body for marriage to the engine and chassis frame. While the radiator, grille and gas tank are attached to the body, the engine, transmission, and frame are independently subassembled on a separate conveyor. Then the body and frame are joined. *Pl. Ex.* 3D; TR 36-37. Once this operation is completed, bumpers are positioned, radiator and transmission fluids are added and tires are installed before the vehicle is rolled to final process.

Final process is the last operations group in the assembly process. It consists mainly of manual detail work, sundry inspections, wheel alignments and drive tests. *Pl. Ex.* 3E. Once the vehicles have completed final process, they are driven to the shipping lot to await importation back to the United States.

At trial, plaintiff established that the total cost for the manufacture and assembly of one automobile was $7,127.42. *Pl. Exs.* 44, 45, 50, 51, and 52, collectively; *see also Plaintiff's Appendix C.* Of this sum, $763.47 is attributed to the cost of the affected components, i.e. (body-in-white), including freight charges and cost of assembly. *Pl. Ex.* 45, 48, 51, and *Defendant's Exhibit C*, collectively; *see also Plaintiff's Appendix B.* Moreover, plaintiff's records further indicated the total time expenditure for assembly of a vehicle is approximately 39.43 standard labor hours ("SLH"). *Pl. Ex.* 45. By way of contrast, the total time allocated to paint shop activities is 7.57 SLHs per assembled body, with only 3.63 SLHs devoted exclusively to topcoating operations. *Pl. Ex.* 46. Finally, total cost of paint shop operations is $113.70, $54.53 of which is attributed solely to topcoating. *Id.*; *see also Plaintiff's Appendix* A.

DISCUSSION

As is by now well established, Customs' classifications are presumed to be correct. 28 U.S.C. § 2639(a)(1) (1982). Therefore, in order to prevail, the party challenging said decision must overcome this presumption of correctness and affirmatively prove proper classification. *Id.*; *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 787 (Fed. Cir.), *cert. denied*, 109 S. Ct. 369 (1988). The same criterion applies for tariff allowance eligibility claims.

American goods that are exported solely for the purpose of assembly are afforded special duty allowances under the TSUS. Item 807.00, TSUS (1986), provides:

> Articles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting

shall be dutiable at the full value of the imported article, minus the cost of such products of United States origin. Thus, in order to qualify for item 807.00, TSUS, allowances, a party must satisfy each of the aforementioned conditions. *Samsonite Corp. v. United States*, 12 CIT 1146, 1147, 702 F. Supp. 908, 909 (1988), aff'd, 889 F.2d 1074 (Fed. Cir. 1989); *Proctor & Gamble Distrib. Co. v. United States*, 11 CIT 450, 451 (1987).

In the instant action, defendant concedes that plaintiff's components were ready for assembly as exported (item 807.00 (a)), and have not lost their physical iden-

tity within the finished product (item 807.00(b)). The Court's analysis, therefore, is limited to whether the components have been advanced in value or improved in condition except by assembly and operations incidental thereto (item 807.00(c)). More precisely, the controversy centers around whether certain painting operations effectuated during the assembly process should be deemed permissible as "incidental to assembly."

The question of what can be deemed "incidental to assembly" is not new to our court. Indeed, the court has had ample occasion to, and taken great care in, delineating the range of operations to be regarded "incidental to assembly." *See, e.g., United States v. Mast Indus., Inc.*, 69 CCPA 47, 668 F.2d 501 (1981); *United States v. Oxford Indus., Inc.*, 69 CCPA 55, 668 F.2d 507 (1981); *Miles v. United States*, 65 CCPA 32, C.A.D. 1202, 567 F.2d 979 (1978); *E. Dillingham, Inc. v. United States*, 60 CCPA 39, C.A.D. 1078, 470 F.2d 629 (1972); *Samsonite*, 12 CIT 1146, 702 F. Supp. 908; *L'eggs Prods., Inc. v. United States*, 13 CIT 40, 704 F. Supp. 1127 (1989); *Surgikos, Inc. v. United States*, 12 CIT 242 (1988); *Zwicker Knitting Mills v. United States*, 82 Cust. Ct. 34, 469 F. Supp. 727 (1979), *aff'd*, 67 CCPA 37, 613 F.2d 295 (1980); *Baylis Bros. Co. v. United States*, 64 Cust. Ct. 256, C.D. 3987 (1970), *aff'd*, 59 CCPA 9, C.A.D. 1026, 451 F.2d 643 (1971).

In these instances, the court often has referred to the legislative history of item 807.00, TSUS, for assistance in determining what "Congress intended to be considered 'incidental to the assembly process.' " *Zwicker*, 82 Cust. Ct. at 47, 469 F. Supp. at 736; *accord*, *Mast*, 69 CCPA at 53, 668 F.2d at 505; *Oxford*, 69 CCPA at 60, 668 F.2d at 510. In so doing, it has construed Congress' objective to

"permit duty-free treatment of a component manufactured in the United States if subjected to an operation 'of a minor nature.' " *Id.*

Specifically, the legislative history of item 807.00, TSUS, chronicles modifications made to the allowance provision and explains the reasons for the changes. "It appears that under the language of item 807.00 minor operations such as painting incidental to assembly abroad may be precluded, and that in certain respects the item is ambiguous." H.R. Rep. No. 342, 89th Cong., 1st Sess. 48.

In a further attempt to "facilitate interpretation and to remove doubt as to the operations that were deemed 'incidental to the assembly process,' " Congress provided as "specific examples operations 'such as *cleaning, lubricating*, and *painting*'." *Zwicker*, 82 Cust. Ct. at 48, 469 F. Supp. at 737 (emphasis in original). These miscellaneous operations, Congress recognized, albeit not part of the assembly process, are often inextricably related to it.

> It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary to remove rust; to remove grease, *paint*, or other preservative coatings; to file off or otherwise remove small amounts of excess material; to add lubricants; or to paint or apply other preservative coatings. * * * Such operations, if of a minor nature incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

H.R. Rep. No. 342, 89th Cong., 1st Sess. 49 (emphasis added).

The Senate Finance Committee elaborated further with reference to their purpose in effecting the proposed changes. The Committee noted that the bill was intended to "(1) clarif[y] the type of articles which may be exported for assembly and then reimported; and (2) *enlarge[ ] the class of activities which may be performed abroad* without subjecting the U.S. product to duty." S. Rep. No. 530, 89th Cong., 1st Sess. 34, *reprinted in*, 1965 U.S. Code Cong. Admin. News 3449 (emphasis added).

In *Zwicker*, the court considered the examples provided by Congress in determining that the operation at issue therein, the fingertipping of knit glove shells, was "clearly not *ejusdem generis* with 'cleaning, lubricating, and painting.' " 82 Cust. Ct. at 48, 469 F. Supp. at 737. The court went on to explain that the fingertipping operations could not be considered minor because they constituted "a critical step prior to assembly" without which further assembly could not occur. Id. (emphasis added).

By contrast, the operation at issue herein is clearly ejusdem generis with Congress' examples. Indeed, it is *eo nomine* one of those examples. Moreover, unlike the fingertipping operations involved in *Zwicker*, which were a prerequisite to assembly completion, the painting operation at issue here is not critical to complete the assembly of the affected components. This is best evidenced by the fact that the affected components are already assembled before they undergo the painting operations.

In two later cases, *Mast* and *Oxford*, our appellate court was required to determine whether certain buttonholing and pocketsplitting operations performed during

assembly were properly deemed "incidental to assembly." 69 CCPA 47, 668 F.2d 501; 69 CCPA 55, 668 F.2d 507. Here again the court had to extrapolate whether the challenged operations were of the sort Congress considered of a minor nature and incidental to assembly. While contemplating Congress' examples of permissible operations, the court noted that "the statute sets forth painting of a component as an example of permissible operations incidental to assembly. It is difficult to visualize a situation where the sole purpose of painting would be to facilitate assembly, or even where painting would be essential to the assembly process." *Mast*, 69 CCPA at 53, 668 F.2d at 505.

The court in *Mast* and *Oxford* went on to specify various relevant factors which should be considered to determine whether the challenged operations were "incidental to assembly" and minor in nature. Among the factors examined were: (a) whether the cost of the challenged operation was substantial relative to the cost of the affected components, (b) whether the time required to perform the challenged operation was significant relative to the time required for assembly of the entire article, and (c) whether the operation was so related to the assembly process that it would "logically [be] performed during assembly." *Mast*, 69 CCPA at 54, 668 F.2d at 506; *accord*, *Oxford*, 69 CCPA at 60, 668 F.2d at 511.

While defendant acknowledges that the standards enunciated in *Mast* are squarely applicable here, it maintains that the relevant comparison should be between the cost and time expenditure of the *entire* paint shop operations versus the cost and time expenditure of the affected components. This suggestion implies either an erroneous interpretation of the guidelines set forth in

Mast, or a misunderstanding of the challenged operations. The *Mast* court unambiguously stated that it compared the "cost of the [challenged] operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article." 69 CCPA at 54, 668 F.2d at 506.

With reference to what operations are "challenged", there is no doubt that all of the operations performed in the paint shop are not at issue herein. Customs itself noted in its rulings that the preservative coating operations that make up the rest of the paint shop operations were in conformity with the spirit of item 807.00. Therefore, for defendant to now demand the use of cost and time figures of *all* paint shop operations when performing *Mast* comparisons is irrational. Only the figures directly attributed to the challenged finish painting operations will render a truthful computation of whether the operation is indeed of a minor nature.

Applying the *Mast* criteria to the case at bar, the Court finds that the cost of topcoating is but a fraction, *i.e.* 14%, of the cost of the affected components. In addition, the time expended in the topcoating operations accounts for less than four SLHs out of a total assembly time of over thirty-nine SLHs. Finally, with respect to the "logical relation to assembly" standard, plaintiff has painstakingly demonstrated that for reasons of economics as well as design, the topcoating operation is most logically performed during the assembly process. *See Plaintiff's Post Trial Brief* at 8-14. Hence, it would appear upon execution of the appropriate cost and assembly time comparisons, which our appellate court has sustained time and again, that the topcoating operation challenged herein is precisely the type of minor operation which Congress intended to be considered "incidental to assembly."

Customs, nevertheless, urges that total body finish painting is not encompassed by item 807.00(c). Instead, defendant maintains, the term "painting" in item 807.00(c) is limited to only protective coatings and slight repair painting. In support of this position, Customs points to a longstanding agency practice embodied in its regulations and reminds the Court that great deference should be afforded to the statutory interpretation adopted by the administering agency.

The regulation Customs refers to is 19 C.F.R. § 10.16 (1986) which states:

> (c) Operations not incidental to the assembly process. Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under item 807.00, Tariff Schedules of the United States (19 U.S.C. 1202):
>
> (1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;
>
> (2) Cutting of garment parts according to pattern from exported materials;
>
> (3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;
>
> (4) Chemical treatment of components or assembled articles to impart new characteristics, such

as showerproofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

Defendant apparently operates under the impression that Congress intended the term "paint," as used in the examples to item 807.00, TSUS, to mean exclusively "preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation." 19 C.F.R. § 10.16(b)(3). However, defendant's only support for this contention is found in its own regulation and the testimony of Mr. Pinter who was involved in the drafting of 19 C.F.R. § 10.16. In light of the significant authority refuting defendant's position, such scant evidence will not suffice.

It is a general rule that statutory terms are presumed to have their common or dictionary meanings. *Brookside*, 847 F.2d at 789. Accordingly, one who argues otherwise must prove that something other than the common or dictionary meaning was intended. Id., (citing *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984)).

Dictionaries and other lexicons are proper sources for the court to consult when determining a term's common or commercial meaning. *Austin Chem. Co., Inc. v. United States*, 835 F.2d 1423, 1426 (1987). Paint is defined in *Van Nostrand's Scientific Encyclopedia* 2117 (7th ed. 1989) as a

> term[ ] used to describe a wide variety of materials designed to adhere to a substrate and act as a thin, plasticlike layer. Paints are available for decorative, protective and other purposes. They can be decorative by covering defects (being opaque), by changing color, or by providing a desired gloss or sheen. Protective uses include shielding metals from corrosion, protecting plastics from degradation caused by ultraviolet light, acting as a moisture barrier and providing mar and scratch resistance for wood or plastic surfaces.

Other lexicographic sources characterize paint as a "substance consisting of a solid colouring matter dissolved in a liquid vehicle, as water or oil, used to impart a colour by being spread over a surface; also applied to the solid colouring matter alone," *The Oxford English Dictionary* 69 (2d ed. 1989), and as a "mixture of a pigment and a suitable vehicle (as oil, water) that together form a liquid or paste that can be applied and spread (as with a brush, spray gun, roller) to a surface so as to form a thin closely adherent coating that dries opaque and imparts color to the surface and that is often designed to protect the surface (as against weathering)." *Webster's Third New International Dictionary* 1621 (1981).

Defendant has not offered, nor has the Court found, anything in the statutory provision, the legislative history, or the various lexicons, to support the premise that Congress intended to restrict the meaning of the term paint. In fact, all definitions of the term, while acknowledging the protective qualities of paint, underscore the aspects relating to pigmentation. Moreover, all the sources consulted noted that all paint, regardless of pigmentation, by its very nature functions as a protective

coating. Given the ultimate use of the merchandise in this case, the Court has no doubt that the protective qualities of the topcoating operation are significant.

Under these circumstances, the Court is not inclined to infer words of limitation where Congress has so specifically omitted them and has in addition expressed an intent that the provision serve to "enlarge[ ] the class of activities which may be performed abroad" without precluding item 807.00 eligibility. S. Rep. No. 530, 89th Cong., 1st Sess. 34, *reprinted in*, 1965 U.S. Code Cong. & Admin. News 3449.

Finally, with respect to the longstanding administrative practice, the Court is well aware and need not be reminded that the administrative agency is often better equipped to interpret nuances in the statutes they are charged with administering. Accordingly, implementing regulations are consulted when the court seeks to construe ambiguous statutes. This notwithstanding, it is fundamental that longstanding administrative practice, if contrary to the plain and unambiguous meaning of the statute, will not attain legal propriety simply because it has been revered. *C.J. Tower & Sons v. United States*, 44 CCPA 40, 44 (1957). Indeed, "it is axiomatic that when a tariff statute [is] construed by the court, it is the judicial decision and not the administrative practice which is controlling." *L'eggs Prods.*, 13 CIT at 49, 704 F. Supp. at 1133. Therefore, while the agency's understanding of statutory intent is often a valuable source of insight for the court to draw upon, it cannot be mechanically equated with legislative intent or, for that matter, be deemed automatically binding on this Court.

Hence, the Court finds plaintiff has met the burden of proving eligibility of its products to item 807.00 treat-

ment. The finish painting operations performed abroad are, by the criteria established by caselaw, minor and clearly subordinate to the assembly process. Moreover, any advancement in value or improvement in condition of the components clearly results from an operation which is "incidental to assembly." Therefore, the Court finds that since all the prerequisites for item 807.00, TSUS, treatment of the components at issue have been fulfilled, plaintiff's entries qualify for the tariff allowances.

Nicholas Tsoucalas
JUDGE

Dated: New York, New York
This 23rd day of July, 1991.